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**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

*G. Ruppert*  
*Proc. I*

**FILE:** B-187870

**DATE:** December 14, 1976

**MATTER OF:** Flair Manufacturing Corp.

**DIGEST:**

1. While GAO will consider protests involving subcontracts under limited circumstances set forth in Optimum Systems, Inc., 54 Comp. Gen. 767 (1975), 75-1 CPD 166, protest is not for consideration where selection of subcontractor was choice of prime contractor and Government's approval was directed not to selection of subcontractor, but to its equipment, and review of action invites GAO to become involved in contract administration.
2. Protest by subcontractor against alleged restrictive specifications is untimely under section 20.2(b)(1) of Bid Protest Procedures because protest of improprieties apparent prior to bid opening was not filed prior to bid opening.
3. Fact that contractor may substitute more expensive item under contract with Government without additional cost to Government does not provide basis for objection by GAO.

Flair Manufacturing Corp. (Flair) protests the award of a subcontract to Braukmann Control Corp. under a General Services Administration (GSA), Public Buildings Service, contract for the replacement of radiator control valves at the Pentagon.

Our Office has been advised informally that the contract (No. GS-03B-17129) was awarded to Kirlin Contracting Co. (Kirlin) on June 30, 1976. By letter of November 19, 1976, to our Office, Flair set forth its grounds for protest as follows:

"(a) Our tests of Braukmann radiator valves show they do not conform to specifications.

"(b) We believe the specifications are unnecessarily restrictive.

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"(c) Our valve will do the job as well and will cost \$2.00 less per valve."

Our Office will consider subcontract protests only in limited circumstances as set forth in Optimum Systems, Inc., 34 Comp. Gen. 767 (1975), 75-1 CPD 166. The circumstances are: (1) where the prime contractor is acting as the purchasing agent of the Government; (2) where the active or direct participation of the Government in the selection of a subcontractor has the net effect of causing or controlling the rejection or selection of potential subcontractors, or of significantly limiting subcontractor sources; (3) where fraud or bad faith in the approval of the subcontract award by the Government is shown; (4) where the subcontract award is "for" the Government; or (5) where a Federal agency entitled to the same requests an advance decision. In Optimum Systems, it was stated further:

"However, where the only Government involvement in the subcontractor selection process is its approval of the subcontract award or proposed award (to be contrasted with the circumstances set out above where direct or active Government participation in or limitation of subcontractor selection existed), we will only review the agency's approval action if fraud or bad faith is shown. \* \* \* Id. at 774.

In this case, the selection of the subcontractor was the choice of the prime contractor. The Government's only involvement was to determine whether the valves being offered by Flair originally, and by Braukmann after GSA's rejection of Flair's valves, conformed with the specifications. Thus, the Government's approval was directed not to the selection of the subcontractor, but to its equipment. Since neither fraud nor bad faith has been alleged or demonstrated in connection with the Government's approval of the subcontractor's equipment and review of this action invites us to become involved in contract administration, this is not the type of subcontract protest where we will assume jurisdiction. Dempster Dempster Systems, B-186678, June 30, 1976, 76-1 CPD 429.

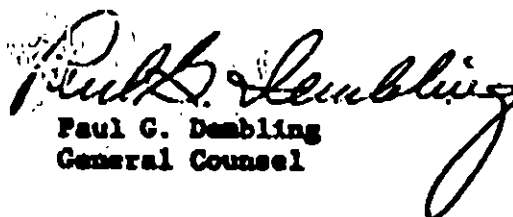
Flair's protest insofar as it concerns the alleged restrictiveness of the specifications is clearly untimely under our Bid Protest Procedures, 4 C.F.R. § 20.2(h)(1) (1976), because the protest of improprieties apparent prior to bid opening was not filed in our

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Office prior to the opening of bids for the prime contract. See United, Inc., B-183343, May 27, 1975, 75-1 CPD 314; Midwest Tele Communications Corporation, B-184923, February 9, 1976, 76-1 CPD 81.

Moreover, the fact that a contractor may be substituting a more expensive item under a contract with the Government without additional cost to the Government does not provide a basis for objection by this Office.

In view of the foregoing, Flair's protest will not be considered on the merits.

  
Paul G. Dembling  
General Counsel